

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JERRY O'NEIL,

Plaintiff,

vs.

CHIP WEBER, in his capacity as
Forest Supervisor for the Flathead
National Forest; CHRIS SAVAGE, in
his capacity as the Forest Supervisor
for the Kootenai National Forest;
CAROLYN UPTON, in her capacity as
Forest Supervisor for the Lolo National
Forest; BILL AVEY, in his capacity as
Forest Supervisor for the Helena-Lewis
and Clark National Forest; and the
UNITED STATES FOREST
SERVICE, a federal agency,

Defendant.

CV 19-140-M-DLC-KLD

ORDER

Magistrate Judge Kathleen L. DeSoto entered an Order and Findings and Recommendation on April 28, 2020 (Doc. 19) and a second Findings and Recommendations on June 5, 2020 (Doc. 21). Plaintiff Jerry O'Neil did not object to either Findings and Recommendation, and accordingly he has waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court reviews for clear error those findings and recommendations to which no party

objects. *See Thomas v. Arn*, 474 U.S. 140, 149–53 (1985). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been made.” *Wash. Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017) (citation omitted).

Having reviewed both Findings and Recommendations (Docs. 19 & 21), the Court finds no clear error. In the Order entered on April 28, 2020, Judge DeSoto (1) ordered O’Neil to show good cause for his failure to timely effect service upon Defendants Chris Savage, Carolyn Upton, and Bill Avey; (2) recommended O’Neil’s motion for default judgment be denied; and (3) recommended that O’Neil be granted 30 days from the date of this Order to complete service on the remaining Defendants, the United States Forest Service and Chip Weber. (Doc. 19.) In the Order entered on June 5, 2020, Judge DeSoto recommended that the Court dismiss O’Neil’s claims against Savage, Upton, and Avey on the grounds that O’Neil did not attempt to show good cause for his failure to timely serve these Defendants.

The Court finds no clear error in Judge DeSoto’s recommendations. Regarding O’Neil’s motion for default judgment, which is liberally construed as a motion for entry of default, Judge DeSoto accurately reasoned that O’Neil cannot seek default without first properly effecting service. The Court agrees that O’Neil never served Savage, Upton, and Avey and that he has not properly served the

United States Forest Service and Weber. Judge DeSoto gave O'Neil an opportunity to remedy the failure as to Savage, Upton, and Avey, and O'Neil did not avail himself of that opportunity. Thus, these Defendants shall be dismissed. Because O'Neil attempted but did not perfect service as to the remaining Defendants, the Court agrees that dismissal is not yet warranted but that O'Neil must perfect service if this matter is to proceed.

Accordingly, IT IS ORDERED:

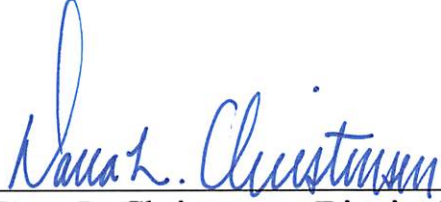
(1) Judge DeSoto's Findings and Recommendations of April 28, 2020 (Doc. 19) and June 5, 2020 (Doc. 21) are ADOPTED IN FULL;

(2) O'Neil Motion for Default Judgment (Doc. 18) is DENIED;

(3) On or before July 27, 2020, O'Neil shall complete service upon the United States Forest Service and Chip Weber, in accordance with Federal Rule of Civil Procedure 4; and

(4) This matter is dismissed without prejudice as to Defendants Savage, Upton, and Avey.

DATED this 25th day of June, 2020.



Dana L. Christensen, District Judge
United States District Court